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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Plaintiff in Error,* vs. ADA T. STEWART, *Defendant in Error.*	No.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

Brief for Plaintiff in Error

S. A. KEENAN,
Attorney for Plaintiff in Error,
Empire Bldg., Seattle, Wash.

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STATEMENT OF THE CASE.

This cause comes here on Writ of Error to review the action of the District Court for the Western District of Washington, Southern Division, in entering judgment against the Plaintiff in Error and in favor of the Defendant in Error.

The suit was brought by the Defendant in Error against the Prudential Insurance Company of

America to recover on a $5,000 policy issued by the company on her husband's life.

On January 26th, 1915, one Ernest C. Stewart, then the husband of Defendant in Error, made written application to the Prudential Insurance Company of America for insurance on his life for the sum of $5,000.

On February 2nd of the same year he signed a medical examination, and immediately thereafter both the application and the medical examination were forwarded to the Home Office of the company at Newark, New Jersey, arriving there February 13th.

On February 19th the application was accepted and the policy of insurance was dated and issued.

On or about February 26th the policy was received at the company's Tacoma office, and on that day was tendered to the insured. After examining the same, noting the due dates of the premiums, and otherwise discussing the terms of the policy with the agent, he expressed his satisfaction therewith and requested the agent to hold the policy as he did not have the money to pay the first premium on that day but would later call at the office, pay the premium and take up the policy.

The insured's request was complied with, and the policy was held at the Tacoma office until April 15th when he called, paid the first premium and received the policy. When the policy was delivered to him, the company's superintendent specifically directed the insured's attention to May 19th as the due date of the next premium; in response to which he stated that he understood that and would be able to take care of it at that time. A few days before the 19th of June, the last day of grace for paying the second premium, the Tacoma office mailed to the insured a notice of the expiration of the time in which to pay that premium.

The second premium maturing on May 19th was not paid then, nor at any time prior to the insured's death which occurred on July 19th.

The provision in the policy for the payment of premiums is as follows:

"——Twelve and 70/100——Dollars, payable on the delivery of this Policy and thereafter quarter-annually at the Home Office of the Company, or as provided under the head 'Provisions' on the second page hereof, in exchange for the Company's receipt on or before the nineteenth day of February, May, August and November, in every year during the continuance of this Policy, until ten full years' premiums shall have been paid, or until the prior death of the Insured."

In the application which is made a part of the policy appears the following provision:

"I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that the foregoing together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application."

By reason of the nonpayment of the second quarterly premium the policy lapsed and became void on June 19th, 1915. The insured died just one month from this date.

The Defendant in Error bases her case entirely on the theory that since the policy did not "take effect" until it was delivered and the first premium paid, the payment of that first premium insured her husband for three months from that date and for thirty days grace in addition thereto. In other words, it is claimed, that he was insured from April 15th to August 15th. She further contends the wording of the policy justifies the construction that all subsequent premiums were payable quarter annually from the actual payment of the first prem-

ium and the delivery of the policy. And that, according to that construction, the second premium was due on July 15th and not on May 15th as specified in the policy itself.

The Company rests its case entirely upon the contract as plainly expressed in the policy and application, and maintains that the construction of the policy, according to the ordinary and usual meaning of the language used, entirely precludes the possibility of the claim of the Defendant in Error.

The Complaint of the Defendant in Error is founded upon the policy as issued and delivered. To her Complaint, the Company interposed a Demurrer on the ground that the Complaint did not state facts sufficient to constitute any claim or cause of action against the Company. The Demurrer was overruled, and exception taken and allowed, an Answer was then filed by the Company, and the case afterwards duly came on for trial before the court and a jury. At the commencement of the trial and before the reception of any evidence, Plaintiff in Error moved the court for judgment on the pleadings, which motion being overruled, with an exception duly allowed, Plaintiff in Error thereupon objected to the reception of any evidence for the reason that the Complaint did

not state facts sufficient to constitute any cause of action against the Company, which Motion, with an exception duly allowed, was also overruled. (Tr. 19.)

Thereupon, Defendant in Error offered in evidence the policy of insurance and application and proof of death, and rested. Whereupon Plaintiff in Error moved the court for an instructed verdict in its favor and against the Defendant in Error for the reason that the facts shown by the evidence did not establish any cause of action against the company, which Motion was overruled and exception duly allowed. (Tr. 20.)

Plaintiff in Error called as a witness in its behalf the soliciting agent who procured the application for the insurance, who testified, in substance, that on the day the policy was received at the Tacoma office, February 26th, he called on the insured and tendered him the policy, which the insured could not take because he did not have the money to pay the first premium. While there, he explained to the insured the various provisions of the policy and particularly called his attention to the due dates of the premiums as specified on the first page of the policy. He requested the agent to keep the policy until he would receive some money that he was expecting, when he would call at the office and take up the policy. (Tr. 22.)

The Company's superintendent at Tacoma also testified as a witness, and stated, in substance, that the insured called at his office on April 15th, paid the first premium and received the policy; that before accepting the money, witness directed the insured's attention to the fact that the second premium was due in one month and asked him if he did not want to include that with the first premium. The insured replied that he would pay the first premium and would take care of the second premium in the course of a month. (Tr. 23.)

A clerk at the Tacoma office also appeared and testified, in substance, that she sent to insured, as alleged in paragraph XII of Plaintiff's Complaint, notice of the maturing date of the second premium, and requesting him to call and pay the same. (Tr. 26.)

At the conclusion of all the testimony, Plaintiff in Error renewed its motion for an instructed verdict in its favor and against Defendant in Error for the reason that it appeared from the pleadings and the evidence that the Company was in no manner liable to the Defendant in Error, which motion was by the court denied and exception allowed. (Tr. 28.)

Thereupon, the Defendant in Error moved the court for a directed verdict in her favor, and be-

fore the same was acted upon by the court, Plaintiff in Error objected to the motion on the ground and for the reason that there were facts established by the evidence which must be passed upon by the jury, in any event, before a verdict could be entered in her favor. Which objection was overruled and the motion of Defendant in Error was granted in words as follows:

"The Plaintiff's motion for an instructed verdict will be granted. Gentlemen of the jury, this policy, to read this whole provision, 'premium, $12.70, payable on the delivery of this policy, and thereafter quarter-annually at the home office of the Company, or as provided under the heading "Provisions" on the second page hereof, in exchange for the Company's receipt on or before the 19th day of February, May, August and November in every year during the continuance of this policy until ten full years' premiums shall have been paid or the prior death of the insured.' Now, if we had nothing to go by but by that language, some doubt might be admitted as to whether 'quarter-annually' referred to after the date of the delivery of the policy and the payment of the first premium, or whether it referred to quarter dates afterwards, that is the 19th day of February, May, August and November after payment, but, when you pause to consider the purpose of the transaction, that is that that first $12.70 paid for something, if that was a quarter's insurance, then it is wholly unreasonable to conclude that the insurance company was taking something for nothing, that it was taking a quarter's insurance for thirty days' insurance. I, therefore, grant the plaintiff's motion, and instruct you to return a verdict in plaintiff's favor, the policy being for $5,000.00, and three of

the quarter payments of the premium for that year not having been paid, that will be deducted from the $5,000.00, leaving, as I understand the calculation of counsel, $4,961.90, and then interest on that at 6 per cent. from October 29th, 1915." (Tr. 30.)

To which ruling an exception was taken and duly allowed.

A verdict was signed and returned by the jury in accordance with the instruction, and over the objection of Plaintiff in Error, received and filed. (Tr. 31.)

In due time thereafter, Plaintiff in Error served and filed its Petition for a New Trial, which came on regularly for hearing and was overruled and an exception duly allowed Plaintiff in Error. For the review of all of which, the case is brought to this court on Writ of Error.

SPECIFICATIONS OF ERROR RELIED UPON.

Plaintiff in Error contends that the lower court erred in the following particulars:

1. In overruling the Demurrer to the Complaint.

2. In denying the Company's Motion for Judgment on the pleadings.

3. In denying the Company's objection to the

introduction of any testimony on the ground and for the reason that the Complaint did not state facts sufficient to constitute a cause of action.

4. In denying the Company's Motion, at the conclusion of all the evidence offered by the Defendant in Error, for a directed verdict in its favor.

5. In denying the Motion of the Company, at the conclusion of all the testimony offered on the trial, for a directed verdict in its favor and against the Defendant in Error.

6. In granting the Motion of the Defendant in Error, at the close of all the testimony, for a directed verdict in her favor and against the Company.

7. In receiving and recording the verdict of the jury.

8. In signing, entering and docketing the judgment in favor of the Defendant in Error and against the company.

9. In the abuse of its discretion in denying the Company's Petition for a new trial.

POINTS AND AUTHORITIES.

The contract of insurance, involved in this case, is plain and unambiguous. It is susceptible of no construction, other than the meaning conveyed by the simple and direct language employed.

So self-evident are its provisions that no additional word or thought can add to their lucidity. It contains no equivocations nor uncertainties to be unravelled by legal or technical knowledge. Any one able to read and comprehend, can readily read and understand this contract. Therefore, we realize the futility of undertaking any explanation. The contract is self-explanatory.

In view of this situation, we feel the burden is entirely on the Defendant in Error. It remains for her to establish her theory as a substitute for the contract so plainly expressed in the policy. So in presenting our opening brief, we must anticipate the position and argument of Defendant in Error.

Each of the foreging specifications of error is grounded upon the lower court's construction of the insurance contract. The argument which follows, is directed against each of the alleged errors. And for these reasons, and for the convenience of this Court, the errors are not discussed separately.

THEORY OF DEFENDANT IN ERROR.—The construction, which Defedant in Error seeks to place on the contract, is indicated by her Complaint, paragraph VII, in words as follows:

"That among the provisions therein contained, was the following:

"Premium—Twelve and 70/100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home Office of the Company,'

following this with an alternative provision of paying quarterly on certain dates mentioned, to local agents in Tacoma, providing such agents had official receipts signed by the president or secretary, and countersigned by an authorized agent of the Company." (Tr. 3.)

The entire provision, in the policy, relative to the payment of premiums, from which the above is taken, is as follows:

"Twelve and 70/100 Dollars, payable on the delivery of this Policy and thereafter quarter-annually at the Home Office of the Company, or as provided under the heading 'Provisions' on the second page hereof, in exchange for the Company's receipt on or before the nineteenth day of February, May, August and November in every year during the continuance of this Policy, until ten full years' premiums shall have been paid, or until the prior death of the Insured." (Tr. 38.)

The phrase, "or as provided under heading 'Provisions' on second page hereof," of course, refers to and modifies the preceding statement as to *where* the premiums are payable. This quoted phrase and the preceding one, in direct and simple words, expresses the amount of the premiums and *where* they are to be paid. The remainder of the sentence states *when* the premiums are to be paid. No modifying word or phrase appears following the dates to render them uncertain or indefinite.

The entire sentence is perfect, grammatically. The phrase quoted, may be placed, between commas, after the word "year," or after the word "insured." But if it were so placed, the sentence would not be so plain and direct, because the quoted phrase would be too remote from that part of the sentence it was intended to modify. All that is found under the heading "Provisions" on second page of the policy, relative to the payment of premiums, is contained in the first paragraph thereof and reads:

"Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable in quarterly or semi-annual instalments, any future instalments of the premium for the current policy year remaining unpaid at the maturity of the Policy shall be considered an indebtedness to the Company on account of this Policy. *Premiums are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company.* If any premium be not paid when due this Policy shall be void and all premiums forfeited to the Company, except as herein provided."

And therein is found the *additional place where* the premiums may be paid, referred to by the phrase: "Or as provided under the heading 'Provisions' on the second page hereof." Thus the *time* and *place* for the payment of the premiums are definitely stated. To adopt the construction plead-

ed in the Complaint—as just quoted—would garble and distort the contract.

Defendant in Error next advances the theory that since the policy was not delivered to the insured until April 15, the second quarterly premium was not due until July 15, which, with the 30 days' grace, carried the insurance up to August 15. This theory was adopted by the trial court. It would seem to be an arbitrary conclusion not only not warranted by, but clearly in contradiction of, the positive terms of the contract. From the provisions of the policy, last quoted, appears the following: "This policy is based upon the payment of premiums *annually in advance* * * *" then continues with the provision that the whole year's premium is due although the insured may be permitted to pay quarterly or semi-annually. It is not provided in this connection, nor elsewhere in the contract, that $12.70, the quarterly payment, carried the policy for three months or any period, but the insured did agree to pay the *annual premium* and further agreed to pay *$12.70 of it* quarter-annually on February 19, May 19, August 19 and November 19. In the *application no dates* were agreed upon for the payment of the premiums. But it was agreed therein: "And it is further agreed that the policy herein applied for shall be accepted

subject to the privileges and *provisions* therein contained." (Tr. 36.) The policy fixes the dates for the payment of the premiums. When it was tendered to the insured, immediately after its issue, and again when he received and accepted the policy, his attention was directed to the provisions of the policy including the due dates of the premiums. Hence, he was fully cognizant of the maturity of the premiums as fixed by the contract. (Tr. 22-3.) And the insured further agreed: "If any premium be not paid when due, this policy *shall be void* and all premiums forfeited to the company, except as herein provided." (Tr. 42.)

In view of these undisputed facts, and the absence of fraud or unfair dealing, it would seem the beneficiary, Defendant in Error, is estopped fro mquestioning the due dates of the premiums as expressed in the policy.

New York Life Ins. Co. v. Fletcher, 117 U. S. 519.

Mutual Life Ins. Co. v. Kelly, 52 C. C. A. 154.

In *Home Ins. Co. v. Myers*, 50 C. C. A. 544, there was in dispute the date from which the insurance became effective, and the Court observed:

"But the contract of insurance usually expressed by a policy was clearly not to be made until the application should be approved by the Company, and then, in the absence of stipulation to the con-

trary, only within a reasonable time thereafter. But, suppose it to be true that the application contemplated that the insurance applied for, if approved by the company, should be effective after July 1, 1892. The company executed its policies bearing date September 8, 1892, reciting in each of them that they were issued in consideration of the 'application for this policy,' and tendered the same to the insured as and for the insurance applied for, and he accepted the same as issued on that application. Such being the case, we are of opinion that the contracts of insurance were accepted by the insured in full satisfaction of the contract for insurance, and that any trifling departures from the provisions of the latter contract were thereby waived by him. The plaintiff, claiming under and through him, is bound by his acts, and on every principle of estoppel cannot repudiate his obligations, constituting the admitted consideration for the policy, and hold the insurer to honor its obligation undertaken for that consideration. The doctrine of waiver and estoppel both combine to prevent any such inequitable result."

In reply to this, we assume her Counsel will fall back on the rule that insurance contracts must be construed against the insurance companies. The statement of Judge Sanborn in *Standard Life & Accident Co. v. McNulty*, 85 C. C. A., 22, is quite applicable to the theory urged in this case by Defendant in Error:

"Counsel for the plaintiff invoke the familiar rule that a policy of insurance should be construed favorably to the insured in cases of doubt or ambiguity. But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the in-

sured. 'Contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.' "

"The natural obvious meaning of the provisions of a contract should be preferred to any curious hidden sense which nothing but the exigencies of a hard case and the ingenuity of a trained and acute intellect would discover."

Conditions that evoked this rule, no longer exist. Then insurance policies were, in effect, unilateral contracts; the terms were entirely dictated by the companies; all profits of the business went to the companies, and the State exerted no supervisory control over them. Now the policyholder participates in the profits, and the State derives a revenue from the premiums paid. The State dictates the essential features which must appear in every policy (R. & B. Code 6155); it, very properly, asserts the right to examine into the condition and management of the companies (R. & B. Code 6146); no form of policy can be used until approved by the Commissioner of Insurance (R. & B. Code 6155), and in many other particulars, the insured is safeguarded by statute. In view of this supervision by the State, there seems no justice in the application of the rule that the contract, when thus made, must be construed against the company.

WHEN DID THE CONTRACT BEGIN AND WHEN WERE THE PREMIUMS DUE? This question is presented by the theory on which Defendant in Error strives to sustain her action. Answer is found in the clear terms of the policy. It is contended that the date of the execution of the policy and times, stated therein, for the payment of the premiums, do not control because of the provision in the application that the policy was not to take effect until delivered and the first premium paid. Unless *something was stated to the contrary, the contract would not be consummated until the risk was accepted, the policy executed and delivered.*

"The general rule is well settled that the policy takes effect from its date, unless it be otherwise stated that it shall only take effect upon certain conditions. It is also held that upon such conditions being met, if the policy is delivered, it takes effect as of the day of its date. May on Insurance, Sec. 400."

Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379.

So in this case, when the insured paid the first premium and accepted the policy, it took effect as of the day of its execution and date.

"Another rule of interpretation applicable here, is, that when there is a conflict between the provisions of the policy and the statements contained in the application the former controls."

Goodwin v. Provident Sav. Life Assur. Soc. (Ia.), 66 N. W. 157.

It is manifest from the context of the entire policy that both parties fixed the date thereof as the beginning of the contract. On the first page, the term of insurance is 10 years "from the date of this policy," at bottom of the page is found this significant provision: "Premiums payable for ten years. *Policy void TEN YEARS AFTER DATE;*" on the second page, a provision is found for converting the policy into another form within 7 years "from the date of this policy;" the suicide clause limits the Company's liability for 1 year from its date; and the incontestability clause likewise begins one year from date; and all other conditions and privileges are calculated from the date of the policy. Had the insured survived, and kept his premiums paid up, until April 14, 1916, and then died by his own hand, of course, the beneficiary would then insist that the insurance had been in force and effect since the date of the policy and would strenuously resist the very construction which *her* action is now based on. Or, had the insured survived until April 14, 1916, with his premiums all paid, and then died, for the same reason the beneficiary would resist the right of the company to contest her claim for the insurance, on the ground, that the policy had been in force since its date. Therefore the date of the

policy is the only date, for the beginning of the contract, that harmonizes with all the provisions of the policy and with the evident intention of the parties thereto. Furthermore, the insured himself so interpreted the policy. (Tr. 22, 23.)

Anderson v. Mut. Life Ins. Co., 164 Calif. 712.

The statute requires the contract of insurance to be in writing. And requires each policy to be signed by certain executive officers of the company. Also requires a medical examination. Section 6155 R. &. B. Code. It must be written so its terms may be definite and certain, and not dependent upon the uncertainty of parol evidence. The policy's most vital elements are the date, the amount of the premiums, and when and where payable. Since the statute requires a medical examination and the signing of the policies by certain officers, the legislature, of course, assumed that some time must intervene between the date of the application and the signing of the policy with all its terms and conditions stated. Especially so where the insured and insurer are on opposite sides of the continent. It must also be remembered that the delay in paying the first premium was entirely the fault of the insured. The only uncertainty complained of in the contract, by his beneficiary, was occasioned entirely by him.

The insured was a school teacher, hence a man of at least ordinary intelligence. Then, it is difficult to imagine how he could have read the policy and been in any doubt as to the date of the commencement of his insurance or the dates for the payment of the premiums. As stated by Justice Peckham in *Nederland Life Insurance Co. v. Meinert*, 199 U. S. 171, "Courts can not proceed upon the theory that policy holders are *non compotes mentis*."

The lower Court erroneously assumed that the $12.70, received on the delivery of the policy, paid for three months' insurance from that date. This assumption became the false major premise of the Court's decision. In so assuming, the Court ignored the positive stipulation, in the policy, that the insurance policy was based on the payment, *in full, of the first year's premium.* This provision was not overlooked, because, in the judgment rendered, the Court deducted the three unpaid quarter-annual premiums. Hence, the lower Court recognized, as it must be conceded, that so soon as the policy was delivered, the assured became liable to the company for the entire annual premium. He agreed to pay it in four equal parts, one-fourth on the delivery of the policy, the other three-fourths on the dates named in the policy. It was provided in the policy,

that if any installment be not paid when due, the policy became void. Both parties mutually agreed in this policy when the subsequent installments were to be paid, and also agreed upon the penalty that must follow the failure to promptly make the payments.

The lower Court, also, erroneously assumed that the assured placed the same construction upon the contract, namely, that when he paid the $12.70, he was insured for four months from the date of the payment. It is shown by the uncontradicted testimony of Mr. Yantis and Mr. Dole that the assured, when the policy was tendered to him, and afterwards, when he finally accepted it, knew the premiums were payable in February, May, August, and November, an tdsated positively that he knew, at the time he made the payment that his next payment would be due in May. In view of this testimony, the Court is not justified in speculating as to the assured's understanding of this particular part of the contract.

AUTHORITIES CITED—So much depends on the peculiar circumstances in individual cases of this character, that decisions in other cases are not, as a rule, very helpful. However, there are a number of cases involving substantially the same question to be found in the State and Federal reports.

For instance, *M'Connell vs. Provident Savings Life Assur. Soc.*, 92 Fed. 769; 34 C. C. A. 663, decided exactly the same issue raised in the case at bar. M'Connell made application for insurance on April 27, signed and dated the application April 29. It was forwarded to the Company, accepted, and a policy issued thereon dated April 27. The premiums were payable quarterly, April 27, July 27, October 27 and January 27. The insured died on the day his second quarterly premium matured, July 27. The second quarter annual premium was not paid. The policy contained the following provision: "This policy does not go into effect until the first premium has been actually paid during the life and good health of the within named insured." The Court, through Judge Taft, states the question presented thus:

"It is argued that, because there was no insurance upon the life of M'Connell until the 9th or 10th of May, when the policy was delivered to him, he was made to pay $20 for two months' insurance, instead of three months, in accordance with the contract, and that the dating back of the policy was merely nugatory and illusory, for it could have no effect by relation."

The Court decided:

"Now, it is quite true that the applicant, upon examining his policy, and finding it dated the 27th day of April, when he did not receive it until the 9th day of May, might have objected to the date, and might have requested that the dates

be changed. In such a case the company could either have declined the insurance, or acquiesced in the suggestion. But until the policy was delivered, and the money paid, the contract of insurance was not entered into by the parties. We can only gather the intention of the parties from the face of the contract itself and the surrounding circumstances. The slightest examination of the policy by the insured would have shown him that the quarterly payments fell due on quarters calculated from the 27th of April. If he did not consent to this, he should then have objected. He made no objection. The evidence shows that he received notice that his premium was due on the 27th of July. Indeed, it shows that two notices were sent, and that he certainly received one. No objection was made on his part to the date at that time."

Methvin v. Fidelity Mut. Life Ass'n., (Cal.) 61 Pac. 1112, is another case wherein the same question was under consideration. The Court holding in that case the date of the policy was the date adopted by both parties to the contract. In that case the premiums were also payable quarterly. "On the trial it was conceded that the second payment was not made, but it was contended that the payment of the first premium ran three months from the 3d day of September, instead of from July 30, as plainly declared both in the policy and the receipt for the first payment delivered with it." In that case the policy was issued and dated July 30th. The quarter annual premiums were due July 30 and every three months thereafter. It was also pro-

vided in the policy that it should not go into effect until it was delivered and the first premium paid. It was not delivered until September 3rd. The lower Court held that the contract went into effect on September 3rd and the payment of the first quarterly premium carried the insurance from that date.

The Supreme Court in reversing the lower court decided:

"The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles, which both parties to the contract, of course, well understood; and, without the provision contained in the policy, that it would not be binding until delivered, the same result would have followed. 'A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.' Civ. Code No. 1626. If it were not delivered until September 3d, the date when the receipt was countersigned by the local agent, that would not alter the case. The payments are expressly specified in the policy to be due and payable on or before the 30th day of July, October, January, and April every day. The first payment, under the terms of the policy, ran from the 30th of July to the 30th of October.

The court might as well undertake to release the insured from the payment of premiums altogether, as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations."

See also: *Thomas v. Northwestern Mut. Life Ins. Co.,* (Cal.) 75 Pac. 665.

In *Jewett v. Northwestern Nat. Life Ins. Co.*, (Mich.) 112 N. W. 734, the Supreme Court of Michigan passed upon the same question. The policy had a similar provision to the effect that it would not go into effect until the first premium was paid and the beneficiary insisted upon the benefit of the time intervening between the actual signing and execution of the policy and the date of its actual delivery. In disposing of this proposition the court observed:

"There is always a time between the application for a policy and its issuance by the company, where it is expressly so provided, that liability does not attach. That fact, however, does not operate to change the times and terms of payment expressly provided in the policy itself. The contention of the learned counsel is that, inasmuch as the policy in question was not in force until the 18th day of August, therefore the payments of the quarterly premiums were postponed 18 days. It would follow also that, had Mr. Jewett lived 10 years, the policy would not have become due until the 18th day of August, 1912, instead of August 1st, as expressly provided in the contract. To so hold would not be the interpretation of ambiguous language, but would result in a court-made contract."

The Iowa Supreme Court in *Tigg v. Register Life & Annuity Ins. Co.* of Iowa, 133 N. W. 322, likewise decided, on facts practically the same as those in the case at bar, that the premiums must be paid as specified in the policy. And speaking of the interval between the execution and date of

the policy and the date of its actual delivery, the Court observed:

"The policy was issued in consideration of the present payment of the premium 'and of the annual premium * * * to be paid * * * at or before 12 o'clock M., on the 7th day of August in every year during the life of the assured.' Even though this fixed the date of the second payment less than a year after the issuance of the policy, it definitely determined the dates at which all premiums were payable, and the 30 days grace would not extend the time within which payment might be made beyond September 7, 1908. Fraud is not charged, as was done in *McMaster v. New York Life Ins. Co.*, 183 U. S. 25."

The Supreme Court of the State of Illinois in *Rose v. Mut. Life Ins. Co.,* 88 N. E. 204, on a similar state of facts, held that the premiums must be paid as specified on the face of the policy, although the policy provided that it did not go into effect until the first premium was paid.

Subsequently, the Appellate Court of that State in *Forch, et al, v. Western Life Indemnity Co.*, 157 Ill. App. 244, in construing a policy executed June 3rd and delivered June 6th, the assured contended that since the policy did not go into effect until its delivery the insurance company was liable, the Court held that as the policy provided that the annual premium should be paid on or before the 3d of June in every year during the continuance of the contract, in the absence of fraud, misrepresenta-

tion, mistake or accident which were not alleged, both parties were bound by its terms and that the policy became void for the nonpayment of the second annual premium on the due date June 3d, 1908.

The Supreme Court of Indiana was called upon to construe a policy of life insurance under practically the same conditions as those involved here, in the case of *Tibbits v. Mut. Ben. Life Ins. Co.*, 65 N. E. 1033. The premiums were payable quarterly. The policy was dated April 25th but was not delivered until April 30 and as the policy provided that it was not to go into effect until delivery, it was contended by the beneficiary that the term of insurance did not begin until that date and that the subsequent quarterly payments must be fixed from that date, also. The Court held:

"The payment of the premium at the very time fixed by the policy was a condition precedent on which the liability of the appellee was expressly declared to depend. * * * Any other day in the month, before or after July 25th, might have been named by them, or the premium for the whole year might have been made payable on a day named in the policy. Both parties would have been bound by such an agreement."

The United States Supreme Court in *McMaster v. N. Y. Life Ins. Co.*, 183 U. S. 25, construed a contract providing that the policy should not be in force until the actual payment of the premium. The policy was executed and dated December 18th. It

was delivered and the first premium paid December 26th. The application was dated December 12th, and this clause inserted therein, by the agent after the application was signed and delivered and without the knowledge or consent of the insured: "Please date policy same as application." The policy was not so dated but it provided for the payment of premiums on December 12th of each year. The question presented was: when did the insurance go into effect, December 12th, 18th, or 26? The question was answered by the court as follows:

"But the policies were not dated December 12, and were dated December 18, the day on which they were actually issued. The applications were in terms, parts of the policies, and by them it was agreed that the policies, though issued, should not be in force until the actual payment and acceptance of the premiums. This was a provision intended to cover any time which might elapse between issue and delivery and payment. So that, notwithstanding the premiums in this instance were not actually paid and received and the policies delivered until December 26, it may be conceded that, and in accordance with the practice in such matters, the contracts of insurance commenced to run from December 18 rather than from December 26. They were certainly not in force on December 12, 1893."

And finally the court decided:

"The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And as

the policies could not be forfeited for nonpayment during that time the month of grace could not be shortened by deducting the six days which belonged to McMaster of right."

Furthermore, in that case, the court held that the insured was not bound by the provision making the premiums payable December 12th, nor was he or his beneficiary estopped from assailing this condition of the contract by receiving and accepting the policy, *because* the *provision* was *inserted without* the *insured's knowledge* and through the *fraud* and *deception* of the *Company's agent.* This part of the decision, therefore, has no application to the case at bar.

"Premiums are payable on the dates fixed by the contract, and the fact that the policy does not go into effect on a date corresponding to the date fixed for payment of subsequent premiums does not change the provisions of the contract as to when such subsequent premiums become payable."

25 Cyc. 751;
Trust Co. v. Ins. Co., 53 Pa. Super 425;
Ins. Co. v. McKay, 6 Ga. App. 285;
Pense v. Assurance Co., 14 Ont. L. R. 613;
Bryan v. Nat. Life Ins. Co., 21 R. I. 149.

We assume the Defendant in Error will cite the following cases:

Stinchcombe v. N. Y. Life Ins. Co., (Ore.) 80 Pac. 213;
Stramback v. Fidelity Mut. Life Ins. Co., (Minn.) 102 N. W. 731;
Halsey v. Amer. Central Life Ins. Co., (Mo.) 167 S. W. 591;

McMaster v. N. Y. Life Ins. Co., 183 U. S. 25.

In the Stinchcombe case the application was made May 5, policy issued July 10, and the policy delivered and first premium paid July 24. The policy expressly stated that the $70.40 paid for "two years' term insurance." A very distinguishing feature from the case at bar where the contract states: *"This policy is based upon payment of premiums annually in advance."* But, in fact, only one-fourth of the premium was paid on the delivery of the policy, at which time the full year's premium was due. And for that reason the parties to the contract could well have agreed to pay the other three-fourths in 10, 20 or 30 days, or on any other date or dates agreeable to them, and likewise could agree that the failure to pay any one of the installments when due, would render the policy void. And the Court would not be justified in segregating the payments, computing the time and arbitrarily stating that the portion of the annual premium paid covered a certain period.

"Primarily, the whole of the annual premium was payable in advance. The consideration for the policy was the payment of the whole premium; if not paid, the policy to lapse. But the option was given the insured to pay thrice yearly in advance. In the first case, there was no obligation to pay the sum insured unless the thrice yearly payments were made when due."

Thompson v. Fidelity Mut. Life Ins. Co., 116 Tenn. 557.

Under the rule announced by the United States Supreme Court in the McMaster case, the applicant, in this Stinchcombe case, was insured from the date of the policy, July 10, 1904, up to July 10, 1906. He died July 3, 1906, so the policy had seven days to run, not including the 30 days grace. Other features in that case clearly distinguish it from the case at bar, so that, in no event, does it sustain the contention of the Defendant in Error in this case.

In the Stramback case, the Court, in the majority opinion, is frank in declaring its attitude towards insurance companies. At the threshold of the opinion it is stated: "The rule of construction to be applied here is that the instrument shall be construed strictly against the insurer." The United States Supreme Court, in like circumstances, in *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 452, defined the attitude that should be assumed by the courts in construing contracts of insurance.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.

"If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performane has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In the Stramback case the Court justified its decision on this provision of the policy:

"The premiums hereon may be paid annually, semi-annually or quarterly, in advance, in accordnace with the company's table of rates applicable hereto, *but in any event this policy shall continue in force only for the period actually paid.*"

which indicates, as the Court holds, that it was the intent of the Company that each semi-annual premium paid for six months insurance. No such inference can be drawn from the contract in this case. Neither did the applicant in that case agree that the policy "would be accepted subject to the privileges and provisions therein contained." The criticism of Judge Brown in his dissenting opinion seems justified.

The Halsey case substantially follows the Minnesota case. Other decisions, of like import, are found in the Missouri Reports. In that case the

$307, hereby insures the life of Augustus C. Halsey policy declared: "In consideration of * * * * * * for the period of one year from the 24th day of May, 1906." The Court held that he was not insured for that period, but from June 5, (date of payment of premium and receipt of policy) to June 5, 1907, the day on which the insured died. This seems to be an instance, referred to by the Supreme Court, where the court undertook to make the contract for the parties.

It is worthy of note that in the Stinchcombe, Stramback and Halsey cases, the Court, in each instance, cites the McMaster case as authority for the opinion. The misinterpretation of the decision in the McMaster case is largely responsible for the decision rendered in each of said cases. For a minute and thorough analysis of the decision in the McMaster case, attention is directed to the opinion of Chief Justice Cartwright in *Rose v. Mut. Life Ins. Co.*, 240 Ill. 45. In the course of a long review of the decision, we find:

"That was a case of fraud on the insured, and the question was whether he was estopped to prove the facts or barred by negligence in failing to read the policies. The decision does not tend to support the argument that the premium in this case was not due according to the terms of the policy, there being no claim of fraud, misrepresentation, mistake, or accident. The policy provided that the

annual premium should be paid on the 23rd day of May in every year during the continuance of the contract, and, in the absence of fraud or mistake, both parties were bound by its terms. *Tibbitts v. Mutual Benefit Life Ins. Co.*, 159 Ind. 671, 65 N. E. 1033."

Judge Hook, in *Johnson v. Mutual Benefit Life Ins. Co.*, 75 C. C. A. 22, in refusing to apply the McMaster case, as desired by the Defendant in Error in the case at bar, said:

"The case of *McMaster v. Insurance Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, upon which counsel rely, is not in point. There the request that the policies when issued be antedated was inserted in the application by the agent of the company for his own private purpose without the knowledge or consent of the insured, and after his signature had been obtained to the application. The policies subsequently issued provided that the due date of future premiums should correspond with the earlier date of the application, but this was neither desired nor authorized by the insured nor was he cognizant of it. On the contrary, when the policies were delivered to the insured untrue representations were made to him as to their purport in this particular."

When Defendant in Error moved for a directed verdict, she, of course, admitted, as the evidence established, that the policy, immediately on its receipt, was exhibited to the insured, its terms explained, including place and time for paying the premiums, and again explained when he finally received the policy, and that it was entirely satisfactory to him. We insist there is no inconsistency what-

ever between the terms of the application and the policy; but, if there had been, it was waived by thus voluntarily approving and accepting the policy. And his beneficiary is estopped from repudiating the contract so made and accepted.

Home v. Myers, 50 C. C. A. 544.

The interest of all policy holders depends entirely upon the contracts of insurance being strictly complied with. If any legal or unjust claim is paid, they must contribute towards that payment. Under the Washington statute (Sub. 5, Sec. 6155, R. & B. Code) and in practically every State in the Union, policy holders participat, directly or indirectly, in the profits of the company. So it is to the interest of every policy holder that no void or forfeited policy be paid. And as the representative of the policy holders, the company is forced to reject all such claims. (R. & B. Code, 6156.) It is neither right nor just for the Court to penalize those, who strictly comply with their contracts, by forcing them to contribute to the one who, through negligence or otherwise, forfeits his contract.

"A life insurance policy usually stipulates: first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit.

"Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality among its patrons.

"Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments."

Klein v. N. Y. Life Ins. Co., 104 U. S. 92.

So, in the consideration of this contract, and the evidence, and the law, we believe this Court will be constrained to reverse the lower Court with directions to enter a judgment dismissing this case.

Respectfully submitted,

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